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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ...

No. 71-339

JACK KERSHAW,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

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INDEX

	Page
Opinions and orders below	1
Jurisdiction	2
Question presented	2
Statement of the case	3
Brief and argument	12
Conclusion	13
Appendix I—Order continuing case	A-1
Appendix II—Order dismissing continuance request	A-2
Appendix III—Order of Court, November 5, 1971	A-4
Appendix IV—Memorandum on petition to rehear	A-6
Appendix V—Order of Court filed June 7, 1971	A-11

Cases Cited

Harris v. U.S., 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965)	12
Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970)	12
Johnson v. Mississippi, ... U. S. ..., 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971)	12

Rules Cited

Supreme Court Rule 40(3)	2
Tennessee Supreme Court Rule 10	10, A-6
Tennessee Supreme Court Rules 14 and 15	A-7

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BRIEF

In Opposition to Petition for a Writ of Certiorari to the Supreme Court of Tennessee

OPINIONS AND ORDERS BELOW

A certified copy of the order of the Tennessee Supreme Court dated December 8, 1970, continuing this case to the March, 1971, session of the said Court at Nashville, Tennessee, upon motion of the Petitioner, is unreported and is attached hereto as Appendix I. A certified copy of the order of the Tennessee Supreme Court dated March 1, 1971, setting forth the dismissal of another continuance request by Petitioner and directing that counsel for the Petitioner file his Assignments of Error and Brief by

March 11, 1971, and return the record to the Tennessee Supreme Court Clerk's office by that date is attached hereto as Appendix II. A certified copy of the order of the Tennessee Supreme Court dated March 22, 1971, reflecting that no Assignments of Error and Brief were filed within the time permitted by the established Rules of the Tennessee Supreme Court and that the Petitioner had failed to file said Assignments of Error and Brief within the time set forth in the Tennessee Supreme Court's order of March 1, 1971, and therefore dismissing the Petitioner's petition for writs of certiorari and supersedeas, is attached hereto as Appendix III. A certified copy of the Memorandum on Petition to Rehear dated June 7, 1971, and order of the Tennessee Supreme Court of the same date denying the Petitioner's petition to rehear because of the Petitioner's failure to follow that Court's aforesaid rules and orders are attached hereto as Appendices IV and V.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The Respondent is dissatisfied with the presentation of the question involved by the Petitioner and, therefore, pursuant to **Rule 40(3)** of the **Supreme Court Rules**, presents the question as follows:

(1) Whether or not the Petitioner, an experienced, licensed attorney, was denied any constitutionally protected right by the action of the Tennessee Supreme Court in dismissing his petition for writs of certiorari and supersedeas and his petition to rehear thereon on the ground that both the Petitioner, and his private counsel, also an experienced, licensed attorney, had flagrantly, knowingly

and continuously violated the established rules of procedure before said Court and the orders of said Court in this case without just cause.

STATEMENT OF THE CASE

On April 14, 1970, the Petitioner, an experienced, licensed attorney at the Tennessee Bar, appeared in open court in Division Three of the Criminal Court of Davidson County, Tennessee, as attorney for a Mr. Robert Vick, who had been charged with certain criminal offenses. On this date he advised the trial court judge that he had copies of the presentments involved and entered a plea of not guilty for the said Mr. Vick. On this same date another defendant, Mr. Don Vestal, who was represented by another local attorney, Mr. Joe P. Binkley, also entered a plea of not guilty through said attorney. Also on the same date in a pending joint case against Mr. Vick and Mr. Vestal, both the aforesaid attorneys advised the trial court judge that they had copies of the presentment in that case; that they both waived formal reading of the presentment and both entered pleas of not guilty for their clients. On this date the trial judge advised both attorneys and their clients that the case would be set for the next term of the trial court and that they would be notified.

On J ne 19, 1970, the Petitioner, along with two other attorneys, was present in the trial court apparently requesting a trial of these cases on June 25, 1970. At this time the Petitioner advised the trial court that he would be representing Mr. Vick in these cases as attorney of record, recognized that he was responsible for the case up until he was relieved and stated that, with regard to his representation of Mr. Vick, "I've got to clear that up today". After some discussion between the trial judge and one of the other attorneys in these cases regarding the length of time necessary to try the cases and other

matters, it was suggested that the cases be set for July 20, 1970. This suggestion was not feasible and the court stated that he would set the cases specially for a day in September which was designated as September 21, 1970. It was requested by the defense counsel involved that the State elect which of the three cases it intended to prosecute on that date in advance and the court, after requring selection of one of the three cases by the local District Attorney General ten (10) days in advance of the aforesaid trial date, stated to all the attorneys in attendance, including the Petitioner, "Don't let there be any misunderstanding on that and on September 21st we will try it and it's got this Court pre-empt and it's got you lawyers' time pre-empt." Upon questioning by the trial court judge, none of the attorneys advised the trial court judge of any conflict on September 21, 1970.

On June 25, 1970, the trial judge announced in open court that the Don Vestal-Robert Vick cases have been passed and set for September 21, 1970 on a special setting.

The Bill of Exceptions herein next reveals that on September 11, 1970, some question regarding the Robert Vick case came before the trial judge at which time the trial judge stated in open Court in the Petitioner's presence ". . . Gentlemen, this case is set specially and has been set specially now, since some 60 days ago or more. . . ." The Petitioner then attempted to interrupt the trial court judge and said judge replied, "Wait a minute, let me get this on the record. This case will be tried on the day it is set for trial. I'm not going to tolerate any disagreement on it now." The trial court judge then asked the Defendant, Mr. Vick, represented by the Petitioner, whether he had an attorney to represent him and Mr. Vick replied, "Yes, sir". The Petitioner then stated to the court, "we had a conference yesterday

afternoon, Your Honor. We talked to Dan Garfinkle by long distance last night and on the basis of that conversation we will represent him in these cases." The trial judge then replied, "All right, now, gentlemen, the record will clearly show that neither you, Mr. Kershaw, (the Petitioner) as his lawyer, nor Mr. Vick, by any other method will be able to raise that as a grounds for a continuance. This case is going to be tried and you are his attorney and you are expected to be here." The Petitioner then replied, "I will state to Your Honor, that I will be here." The trial judge then reminded counsel that he did not want any doubt about the matter to which the Petitioner replied, "Well, I'm just telling you again." The trial judge responded, "All right," and the Petitioner responded again, "All right, sir."

The matter came on for trial on September 21, 1970, on the date specially set for the trial and, after the attorney for the State announced that the case which would be tried on this date was the one wherein Mr. Vick and Mr. Vestal were jointly indicted and it was determined that a trial jury was available and the trial judge stated that it was ready to take up the case. At that time the Petitioner announced that he wished to be relieved of representing Mr. Vick and that Mr. Vick had made arrangements for other counsel. He stated to the trial judge that he understood that Mr. Vick's other counsel was adequately prepared and, on that basis, ". . . I am ready to state in that accord my motion to withdraw." The trial judge then reminded Mr. Kershaw that the matter of his being relieved of representation of Mr. Vick had occurred on two previous occasions; that on Friday of the previous week he had made a motion to be relieved, in open court, with Mr. Vick present and that at that time Mr. Kershaw personally assured the Court that there was no problem regarding said representation and that he would be trial counsel for Mr. Vick. The Petitioner

admitted that the foregoing had transpired but stated that ". . . there's no difficulty now, he has representation." The trial court then advised the Petitioner that he was still the attorney of record and was expected to be here present throughout the trial as attorney for the defendant; that he was overruling the Petitioner's motion to be relieved but did not object to another attorney being associate counsel. That he was going to permit wide latitude regarding associate counsel by both defendants in this case since both defendants had two lawyers, but that it ". . . the case begins to unnecessarily drag out through the problem of co-counsel, then I'm going to restrict the proceeding back down to the lead counsel. So, all of you, the State and each defendant, bear in mind." The Petitioner then stated to the court that he would like to ". . . say one more thing, if I may," and the court responded that he didn't intend to allow a lot of speeches in the case and that the Petitioner was still in the case. The Petitioner again attempted to make a statement to the Court about the matter of representation and the Court then advised the Petitioner, "Mr. Kershaw, don't push me. Sit down over there and be ready to try this lawsuit. You are not being relieved." The Petitioner then responded that he could not believe the defendant on oath and did not want to represent him. The trial court judge responded that the Petitioner should have taken this matter up during his motion made about nine (9) days before the trial date when he had ample opportunity to do so and that this matter would not be discussed further. The Petitioner then stated to the court that if he was attorney of record, he presumed he should have an opportunity to try to get some cooperation out of his client. The trial court judge then reminded the Petitioner that at the time of his motion to be relieved a week earlier he had advised the Court that he had made a telephone call to Miami Beach, Florida and that

all matters of representation were in order. The Petitioner then stated that he remembered the situation during the previous week but that the same was different on this the trial date. The trial court judge disagreed that the situation had changed a great deal and advised the Petitioner that he knew what he was doing during the previous week. The Petitioner responded that he knew that Mr. Vick would have representation on the trial date and that Mr. Vick would have counsel present. The trial court judge then stated that the Petitioner had advised him differently during the previous week and that if the Petitioner was willing to be incarcerated for ten (10) days for contempt he would let him out of the lawsuit and proceed with other matters, but that "I'm not going to take this, Mr. Kershaw." The Petitioner, Mr. Kershaw, then stated that he had tried to outline the matter in a ". . . in a common sense situation," and the trial court judge replied that he had an opportunity to do this a week before and asked the Petitioner whether he was ready to sit down and try the lawsuit on the merits. The Petitioner then stated, "I can do nothing else." and the trial judge responded, "that's right. All right, bring some jurors."

At this time it was agreed that a witness who was in attendance in the court room could return to his place of employment upon call and, after the prosecutor, Mr. Earl Wingo, was seated with the State's attorney, the jury was selected.

It appears from the record that the defendant Vick's co-counsel conducted examination of the prospective jurors. After both sides agreed that the jury was acceptable and just before the jury was brought in, the Petitioner addressed the court asking permission to make a motion at that time in the absence of the jury. The trial court judge replied that his motion would be out of order since the

matters now before the Court dealt with the empaneling of the jury. The alternate juror was then selected. The trial court judge then announced to the jury that because of the hour of the day the case would be adjourned until the next morning at 9:30 a.m. and that they would be in the custody of the court officers until that time. The jury then withdrew and the court asked the Petitioner what was the nature of his motion. The Petitioner then stated that he had discussed the matter further with Mr. Vick and his other counsel and that he was unemployed and did not wish to be employed in the matter and the judge replied that he had already ruled that the Petitioner was in the case and would not entertain any conversation in that regard. The Petitioner then stated that he had a piece of new information that he believed would justify a motion and the court replied that based upon the past record in this case and the fact that the Petitioner was an officer of the court he would not discuss the matter further. The Petitioner's exception was then noted and court was adjourned until the next morning or September 22, 1970.

On the next morning after all parties and counsel announced present and the jury roll was called, the trial court judge announced that he was ready to proceed and directed the State's counsel to read the presentment. At this time the Petitioner stated in open court that he had a preliminary matter he wanted to take up in the absence of the jury. The trial court judge then stated that the presentment would be read and, after the presentment was read and the defendants entered pleas of not guilty, the jury withdrew to the jury room upon the direction of the trial court judge. The trial court judge then asked the Petitioner the nature of the matter he desired to take up and the Petitioner responded by stating that he had a motion he desired to read into the record and began reading said motion which dealt with the subject of withdraw-

ing as counsel for the defendant Mr. Vick. The trial court judge advised the Petitioner that said motion was out of order and the Petitioner responded, "Then I will address the record, which is my privilege." The trial court judge then stated, "No, sir, you will be in contempt of court if you raise the question one more time, Mr. Kershaw." The Petitioner then stated, "I will file this right now as part of the record. Let the record show I'm filing this. Mr. Clerk, will you come and accept this." All the foregoing, of course, occurred in open Court before the trial court judge.

The trial court judge then directed that the Petitioner be taken into custody and delivered to the jail for ten (10) days for contempt of court and stated, "Gentlemen, I declare a mistrial in this case. It is obvious that that has been the intention down the line." The Petitioner responded, "Let the record show that that is not the intent." The trial court judge then stated, "Mr. Kershaw may be delivered to the jail for 10 days." and the Petitioner responded, "I'm not in contempt." Counsel for Mr. Vick's co-defendant then stated, "May I address the Court and say to Your Honor that I'm sorry that this situation occurred." The trial court judge then reiterated the history of the special setting of this case; stated that he could not condemn any counsel for anybody's action in this regard and stated that, although he was sorry, he did not know of any way the Court could conduct its business. Mr. Vick's co-counsel, Mr. Wehby, then stated to the Court, "Your Honor, I'm certainly sorry and I am prepared to go forward. Whatever Your Honor rules." And counsel for the co-defendant, Mr. Binkley, stated, "We understand the Court's position." The trial court judge then stated that he knew no way to avoid declaring a mistrial in this case and the State's counsel thereafter stated, "I would like to state that there is absolutely no State action involved in this case. If the defendant's at-

torney can come into a Court and disrupt the proceedings like this, there is no way a defendant ever could be brought to justice." The aforesaid Mr. Joe P. Binkley, as attorney for the Defendant, Vestal, said, "I think Your Honor knows that I have a deep and abiding respect to this Court and with all deference to this Court, it bothers me to some extent that an attorney would put himself in that position in this matter and shed some . . . it just can't help but filter into the other defendant, and Mr. Vestal certainly had nothing to do with it and was not involved in it and Your Honor is exactly right. Your Honor told us some time ago to be ready and we have been ready. We haven't asked you for any continuances." Thereafter a mistrial was declared and the jury excused. This also was all in open court.

On the date of the Petitioner's commitment for contempt, as aforesaid, or September 22, 1970, the Petitioner petitioned the Tennessee Supreme Court and was granted, ex parte, writs of certiorari and supersedeas to review and stay the aforesaid commitment. No assignments of error and brief and transcript of the record accompanied said petition as required by **Rule 10** of the **Tennessee Supreme Court** rules (App. IV.). The case came on for oral argument before the Tennessee Supreme Court on December 8, 1970, at which time it was continued to the March, 1971 session of said Court on motion of the Petitioner (App. I). The transcript of the record was not filed in said Court until December 7, 1970, or two and one-half (2½) months after the said petition was filed and granted. On February 12, 1971, or four and one-half (4½) months after the filing of the petition and more than 2 (2) months after the transcript had been filed, the Respondent filed a motion to dismiss the petition on the ground that no assignments of error and brief had been filed within the time required by the rules of the Tennessee

Supreme Court nor any extension of time prayed for or granted. The Petitioner made no response to this motion.

On March 1, 1971, the case came on for argument and neither Petitioner nor his counsel were present and no assignments of error and brief had been filed and no application had been made to the Court for an extension of time or for a continuance. Counsel for the Respondent then advised the Court that on the previous evening Petitioner's counsel had, by telephone, requested another continuance and requested that Respondent's counsel advise the Court of an illness in Petitioner's counsel's family. Although another continuance was not granted, the Court, by written order, granted the Petitioner another ten (10) days to file his assignments of error and brief. On March 11, 1971, the last day for filing assignments of error and brief under the aforesaid order, such had not been done either by the Petitioner or his private counsel and no application for an extension of time had been made. Consequently, on March 22, 1971, with still no assignments of error or brief being filed, the Tennessee Supreme Court entered an order granting the Respondent's motion to dismiss (App. II, III, IV). On April 1, 1971, the Petitioner filed the assignment of errors and brief in this case, accompanied by a petition to the Tennessee Supreme Court to rehear, reconsider and vacate its order of dismissal. This last petition was denied by the Tennessee Supreme Court in an order entered on June 7, 1971, with attached Memorandum on Petition to Rehear (App. IV and V).

BRIEF AND ARGUMENT

The Respondent submits that the Petitioner has been denied no rights protected by the United States Constitution in the aforesaid action of the Tennessee Supreme Court particularly since the Petitioner is a licensed, experienced attorney and his private counsel is also a licensed, experienced attorney, both of whom not only know the applicable rules of practice before the Tennessee Supreme Court but were aware of the orders of said court herein involved and yet continuously and flagrantly failed to comply therewith.

Further, the Petitioner's contention that his summary punishment for contempt herein violated his rights under the due process law of the 14th Amendment to the United States Constitution is without merit. The entire matter which is herein involved occurred in the presence of the trial court judge in open court and it is well settled that a trial judge has the power to punish instantly the contempt of its lawful orders and commands where said violations occur in the presence of the court and such action is necessary in order to preserve the dignity and authority of the court and to preserve order in the trial. See **Illinois v. Allen**, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed. 2d 353 (1970); **Harris v. U. S.**, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965), and **Johnson v. Mississippi**, ... U. S. ..., 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971). In the case *sub judice* the Respondent respectfully submits that the trial judge was entirely justified in his action as reflected in the contemporaneous comments of other trial counsel present.

CONCLUSION

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted

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APPENDIX I

Supreme Court, Nashville

MB 48/374

Jack Kershaw, Petitioner,

vs. Davidson, Criminal.

State of Tennessee, Respondent. Continuance.

Upon motion of petitioner and for good cause shown, the hearing in this matter is continued until the March, 1971 Session of the Court at Nashville; and it is so Ordered. 12/8/70.

Office of Clerk of the Supreme Court
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Order of Continuance of said Court, pronounced at its December term, 1970, in case of Jack Kershaw, Petitioner, against State of Tennessee, as appears of record now on file in my office. (Minute Book 48, Page 374)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 5th day of November, 1971.

(Seal) RAMSEY LEATHERS, Clerk
By ....., Deputy Clerk

APPENDIX II

Supreme Court, Nashville

MB 48/403

Jack Kershaw, Petitioner,

vs. Davidson, Criminal.

State of Tennessee, Respondent.

Order

This cause came on to be heard at the regular call of the docket; and,

It appearing to the Court that a motion has been filed by Respondent to dismiss the petition because of failure of counsel for Petitioner to file a brief pursuant to the Rules of this Court, and that counsel for Petitioner has failed to return the record to the office of the clerk; and,

It further appearing to the Court from statement of counsel for Respondent that counsel for Petitioner was unable to appear because of illness in his family and requested that the cause be continued until the next session of the Court, which request for continuance is not agreed to by Respondent.

From all of which, the Court is of opinion that the cause should not be continued but be submitted to the Court upon the entire record, including any motions and briefs in support thereof heretofore filed, and briefs to be submitted.

It is, therefore, Ordered that counsel for Petitioner is granted to and including March 11, 1971, within which to file a brief in support of the petition; and,

It is further Ordered that the record in this cause be returned by counsel for Petitioner to the office of the Clerk no later than 4:30 P.M. on March 11, 1971.

Enter, this the 1st day of March, 1971.

(Illegible)
Chief Justice

Office of Clerk of the Supreme Court
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Order filed March 1, 1971 of said Court, pronounced at its December term, 1970, in case of Jack Kershaw, Petitioner, against State of Tennessee, as appears of record now on file in my office. (Minute Book 48, Page 403)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 5th day of November, 1971.

(Seal)

RAMSEY LEATHERS, Clerk
By ....., Deputy Clerk

APPENDIX III

Supreme Court, Nashville

Jack Kershaw,
Petitioner,
vs.
State of Tennessee,
Respondent.
} Davidson County

Order

This cause came on to be heard upon the petition of Jack Kershaw, Petitioner, for the writs of certiorari and supersedeas and the motion of the Respondent, State of Tennessee, to dismiss the petition and to set aside the supersedeas heretofore granted staying further proceedings on the judgment and order under which Petitioner was confined pending disposition of the matter, upon the grounds that no assignments of error and brief in support of the petition were filed within the time required by Rules 10, 14 and 15 of this Court; and,

It appearing to the Court that the petition for the writs of certiorari and supersedeas was filed herein on September 22, 1970, and that the writs of certiorari and supersedeas were issued the same date; and,

It further appearing to the Court that the transcript of the record was filed with the Clerk on December 7, 1970, and the matter set for hearing at the regular call of the docket on March 1, 1971, at which time counsel for Petitioner was granted to and including March 11, 1971, within which to file assignments of error and brief; and,

It further appearing to the Court that no assignments of error and brief in support of the petition have been filed and that the motion of the Respondent to dismiss the petition and set aside the supersedeas is proper and should be sustained.

It is, therefore, Ordered that the motion of the Respondent to dismiss the petition for the writs of certiorari and supersedeas be and is hereby sustained, and the petition is dismissed.

It is further Ordered that the supersedeas heretofore granted on September 22, 1970, is hereby set aside and for nothing held.

The Clerk is directed to forward certified copies of this Order to the Honorable Allen R. Cornelius, Jr., Judge, Division III of the Criminal Court of Davidson County, counsel for Petitioner and counsel for Respondent, the Petitioner, Jack Kershaw, the Clerk of the Criminal Court of Davidson County and the Sheriff of Davidson County.

The Petitioner, Jack Kershaw, will pay all costs incident to this proceeding, for which let execution issue. 3/22/71.

Per Curiam

Office of Clerk of the Supreme Court
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Order Filed March 22, 1971 of said Court, pronounced at its December term, 1970, in case of Jack Kershaw, Petitioner against State of Tennessee as appears of record now on file in my office (Minute Book 48, Page 412).

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 5th day of November, 1971.

RAMSEY LEATHERS
Clerk

By .....
Deputy Clerk

(Seal)

APPENDIX IV

Jack Kershaw,
Petitioner,
vs.
State of Tennessee,
Respondent.
} Davidson County

Memorandum on Petition to Rehear

(Filed June 7, 1971)

This cause is before the Court upon a "Petition to Rehear," following the Court's order of March 22, 1971, dismissing the previously granted petition for the writs of certiorari and supersedeas, because of petitioner's failure to file an assignment of errors and brief as required by the Rules of this Court.

The petition in this cause, for the writs of certiorari and supersedeas, was filed on September 22, 1970, seeking relief from the order of a Circuit Judge of Davidson County committing the petitioner, an attorney, to the County Workhouse, for contempt of court. This petition was not accompanied by an assignment of errors, brief, and transcript of the record as required by Rule 10 of our Court,[1] but because of concern with the circumstances

[1] "**Rule 10.** Petitions presented to a judge, or to the court in term time, for writs of error, or writs of error and supersedeas, or writs of certiorari and supersedeas, to review, reverse and supersede judgments and decrees of trial courts, shall state the case briefly, and be accompanied by an assignment of errors, and a brief, as herein required of cases brought to this court by appeal, and a transcript of the record; and if filed for supersedeas, or after one year, also by a copy of notice served on oppcsite party or counsel, affording him an opportunity to file a reply brief, or such reasons for the failure to do so as the court or judge may deem sufficient to excuse the party from giving notice (Tipton v. Tipton, 118 Tenn. 691)."

of the case, the petition was nonetheless granted, and the case set for argument before the Court on December 8, 1970.

The transcript of the record was not filed in this Court until December 7, 1970, some two and a half months after the petition for certiorari was filed and granted. Subsequently, on application of petitioner, on December 8, 1970, the case was ordered continued until the March 1971 session of the Court.

On February 12, 1971, some four and a half months after the filing of the petition, and more than two months after the transcript had been filed, the respondent filed a motion to dismiss the petition on the ground that no assignment of error and brief had been filed within the time required by Rules 10, 14 and 15,[2] nor had any ex-

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[2] **"Rule 14**: Counsel for appellant or plaintiff in error in all civil cases shall file with the clerk of this court not more than twenty-five (25) days after the date of the filing of the transcript of the record, assignment of errors and brief in support of same, typewritten or printed in accordance with Rule 3."

"Rule 15: Briefs in support of assignments of error.—The assignments of error must be accompanied by a brief, which shall state concisely and specifically the propositions of law and fact, without argument or elaboration, relied upon by the appellant, or plaintiff in error, to sustain the several errors assigned for reversal of the trial court. There must follow each proposition of law a citation of the authorities relied upon to sustain it, and there shall follow each proposition of fact citations to the record which are relied upon to sustain the contention of the appellant, or plaintiff in error.

(1) This brief must be filed in all cases.—It may be combined with the assignments of error, or filed in a separate form. An argument will not supply the place of a brief.

(2) Case affirmed when assignments of error not filed.—When appellants, or plaintiffs in error, in civil cases, fail or refuse to file an assignment of errors and brief, as required by this rule, it will be taken as an abandonment of the appeal or writ of error, and the decree or judgment will be affirmed. Errors not assigned and supported by brief according to this rule, will be treated as waived, but the court, in its discretion, may notice an error overlooked by counsel."

tension of time been prayed for or granted. No response was made to the motion by the petitioner.

When the case was called for argument, on March 1, 1971, neither petitioner nor his counsel was present. No assignment of errors and brief had been filed, and no application had been made to the court for an extension of time, or for a continuance. Counsel for the respondent stated to the Court that petitioner's counsel had contacted him by telephone, and asked that he inform the Court that illness in his (counsel for petitioner) family prevented his appearance, and that he (counsel for petitioner) requested a continuance until the next term of Court. Counsel for respondent, in view of the long period of time during which petitioner had failed to file an assignment of errors and brief, opposed the request for a continuance and relied on his motion to dismiss.

Although no continuance was granted, the Court on its own motion ordered that the petitioner be given ten days in which to file his assignment of errors and brief.

Upon the expiration of the ten day period, on March 11, 1971, no assignment of errors and brief had been filed, nor had any application for extension of time been made to the Court. Consequently, on March 22, 1971, an order was entered granting the respondent's motion to dismiss the petition.

On April 1, 1971, the petitioner filed the assignment of errors and brief in this cause, accompanied by a petition to the Court to reconsider and vacate its order of dismissal. Counsel for the petitioner, in the "Petition to Rehear," stated only that: "his failure to file the necessary pleadings within the time graciously extended and allowed by this Court was not due or owing to any lack of respect for the Court, but rather to inadvertence and the sudden illness and subsequent death of his father,

and for no other reason, and certainly not for the purpose of delay."

By the most lenient construction of our Rules, as applied to this case, the petitioner was required to file his brief and assignment of errors within twenty-five days of the date of filing of the transcript (Footnote 2, Rules 14 and 15, supra). Perhaps it is arguable that Rule 17, concerning Criminal Appeals, has some application to the case, but to decide that is unnecessary, since Rule 17 allows only thirty days from filing of the transcript within which to file assignment of errors and brief. No such filing was made here until almost four months after the transcript was filed, and six months after filing of the petition. The Court is strongly of the opinion that the single reason given by petitioner's counsel for his failure to file an assignment of errors and brief in no way excuses his failure to take any action in this case over the months prior to the calling of the case in March of 1971, nor is it sufficient to justify his ignoring the extension of time granted. The Court is of the opinion that it has already made substantial concessions to the petitioner, in its desire to hear his case on its merits, and holds that it will not so completely abandon its rules as to withdraw our order of dismissal.

We note that what we have said above applies with greater force because the petitioner himself is an attorney, and certainly was aware of his counsel's action (or lack of it) in this case, and of the Rules of our Court.

It follows from the above that the petition to rehear will be denied.

/s/ HUMPHREYS, J.
for the Court

Office of Clerk of the Supreme Court
for the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Memorandum on Petition to Rehear of said Court, pronounced at its December term, 1970, in case of Jack Kershaw, Petitioner, against State of Tennessee, as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 5th day of November, 1971.

/s/ Ramsey Leathers, Clerk
By ....., Deputy Clerk

(Seal)

APPENDIX V

Jack Kershaw,
Petitioner,
vs.
State of Tennessee,
Respondent.
} Davidson County.

Order

(Filed June 7, 1971)

This cause came on to be heard upon the petition to re-hear, the assignment of errors and brief, and the reply thereto, and upon the entire record in this cause; and,

It appearing to the Court that the petition for the writs of certiorari and supersedeas were filed in this cause on September 22, 1970, and that the writs of certiorari and supersedeas were issued the same day; and,

It further appearing to the Court that the transcript of the record was filed with the Clerk on December 7, 1970, and that on motion of the petitioner on December 8, 1970, hearing of the matter was continued until March 1, 1971, at which time counsel for the petitioner was granted to and including March 11, 1971, within which to file assignments of error and brief; and,

It further appearing to the Court that upon failure of counsel for the petitioner to file assignments of error and brief by March 11, 1971, the motion of the respondent to dismiss the petition and set aside the supersedeas was granted, and an order to such effect entered on March 22, 1971; and,

It further appearing to the Court that the petition to rehear sets forth no reason sufficient to excuse the failure

of counsel for the petitioner to have filed assignments of error and brief within the time allowed by the Court, the Court is of the opinion the petition to rehear should not be granted.

It is, therefore, ordered that the petition to rehear be and hereby is dismissed at the cost of the petitioner.

It is further ordered that the order of this Court of March 22, 1971, dismissing the petition for certiorari and setting aside the supersedeas heretofore granted be and hereby is stayed for a period of ninety days, from the date of entry of this order, pending the filing disposition of a petition for the writ of certiorari to be presented to the Supreme Court of the United States.

HUMPHREYS, J.
For the Court

Office of Clerk of the Supreme Court
For the Middle Division of the State of Tennessee

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Order on Petition to Rehear of said Court, pronounced at its December term, 1970, in case of Jack Kershaw, Petitioner, against State of Tennessee, as appears of record now on file in my office. (Minute Book 48, Page 442)

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 5th day of November, 1971.

(Seal)

RAMSEY LEATHERS, Clerk
By ....., Deputy Clerk
RUST W. DYER